KNM Process Systems Sdn Bhd v Mission Biofuels Sdn Bhd

HIGH COURT (SHAH ALAM) — COMPANIES WINDING UP NO 28–461–11 OF 2012
VERNON ONG J
3 MAY 2013

Companies and Corporations — Winding up — Disputed debt — No judgment obtained — Inability to pay debts — Petition grounded on respondent's contingent and prospective liabilities — Locus standi — Whether petitioner had locus standi to present winding up petition — Burden of proof — Whether petitioner had proven that respondent was unable to pay its debts and ought to be wound up — Whether respondent's liabilities exceeded its assets — Whether debt must be proved — Companies Act 1965 ss 217(1)(b), 218(1)(e) & (2)(c)

The respondent appointed the petitioner as its contractor to construct a bio-diesel plant in Kuantan ('the project'). The petitioner alleged that the respondent failed to settle the final installment payment of RM49,857,934.70 due under the contract, and a further sum of RM804,123.10 for materials supplied. The petitioner had thus filed two actions against the respondent to claim the two outstanding payments. Both these actions had been stayed by the High Court and the claims referred to arbitration, which was pending. In the meantime the petitioner discovered that the respondent and its group of companies were insolvent. The petitioner thus decided to exercise its statutory right under s 218(e) and (i) of the Companies Act 1965 ('the Act') to present the present a winding up petition ('the petition') against the respondent. The petition was not premised upon a judgment debt, there being no judgment entered against the respondent, but presented against the respondent on the grounds that it was unable to pay its debts under s 218(1)(e) of the Act because of its contingent and prospective liabilities pursuant to s 218(2)(c) of the Act. The petitioner submitted that given the state of the respondent's accounts including that of its holding company, the state of insolvency required by s 218(2)(c) of the Act had been proven. The respondent challenged the petitioner's locus standi to present the petition by arguing that the petitioner was not even a creditor much less a contingent creditor. The respondent argued that the issue of solvency did not come into the picture yet because the petitioner had to establish that there was a debt, which was due and owing first. The respondent further submitted that there was a bona fide dispute as to the debt allegedly due and owing and that the presentation of the petition was an attempt by the petitioner to frustrate the arbitral process by making unfounded allegations as found in the petition.

Held, dismissing the petition with costs of RM15,000:

(1) Although the petitioner's debt only became payable based upon the

outcome of arbitration proceedings, it was a contingent creditor within the meaning of s 217(1)(b) of the Act. As such, the petitioner had the locus standi to present the petition against the respondent (see para 14).

(2) In cases where a creditor, including a contingent or prospective creditor had elected to proceed under s 218(2)(c) of the Act, the onus was on the creditor to prove to the satisfaction of the court that the company was unable to pay its debts. The question of whether a company was unable to pay its debts was essentially a question of fact (see paras 28–29).

(3) Under s 218(2)(c) of the Act, the ground for winding up under s 218(1)(e) of the Act is made out if the plaintiff was able to adduce sufficient evidence that after taking into account the company's contingent and prospective liabilities it was unable to pay its debts. In this sense, insolvency did not necessarily require proof that the company's liabilities exceeded its assets, but required an examination of the company's entire financial position. In the present case, the financial reports and the notes to the report relied upon by the petitioner had failed to point to any debt to which the respondent was unable to pay or liable to pay. On the evidence as a whole, and after taking into account the respondent's contingent and prospective liabilities, it was not proven that the respondent was unable to pay its debts. There was in fact a surplus of total assets over total liabilities and insufficient evidence to justify a finding that the respondent was insolvent. As such, the petitioner's petition was unsubstantiated (see paras 25 & 36).

(4) The facts of the two cases referred to by the petitioner in support of its case, namely *Teck Yow Bros Hand-bag Trading Company v Maharani Supermarket* and *Morgan Guaranty Trust Company of New York*, were distinguishable from the present case (see paras 37–38).

[Bahasa Malaysia summary

Responden telah melantik pempetisyen sebagai kontraktor untuk membina loji bio-diesel di Kuantan ('projek'). Pempetisyen mendakwa responden gagal menjelaskan bayaran ansuran terakhir sebanyak RM49,857,934.70 dibayar di bawah kontrak itu, dan sejumlah wang tambahan sebanyak RM804,123.10 untuk bahan yang dibekalkan. Pempetisyen telah dengan itu memfailkan dua tindakan terhadap responden untuk menuntut dua bayaran tertunggak. Kedua-dua tindakan ini telah digantung oleh Mahkamah Tinggi dan tuntutan dirujuk kepada timbang tara, yang belum selesai. Sementara itu pempetisyen mendapati bahawa responden dan kumpulan syarikat adalah solven. Pempetisyen dengan itu memutuskan untuk menggunakan hak statutori di bawah s 218(e) dan (i) Akta Syarikat 1965 ('Akta') untuk mengemukakan petisyen penggulungan ('petisyen') terhadap responden. Petisyen itu tidak berlandaskan hutang penghakiman, di mana tiada penghakiman dimasukkan terhadap responden, tetapi dikemukakan terhadap responden atas alasan

bahawa ia tidak dapat membayar hutangnya di bawah s 218(1)(e) Akta tersebut kerana liabiliti kontinjen dan prospektifnya menurut s 218(2)(c) Akta tersebut. Pempetisyen berhujah bahawa memandangkan keadaan akaun responden termasuk syarikat induknya, keadaan insolvensi dikehendaki oleh s 218(2)(c) Akta tersebut telah terbukti. Responden mencabar locus standi pempetisyen untuk mengemukakan suatu petisyen dengan berhujah bahawa pempetisyen bukan pun pemiutang apa lagi pemiutang kontinjen. Responden berhujah bahawa isu kesolvenan tidak timbul kerana pempetisyen perlu membuktikan terdapat hutang, yang kena dibayar dan terhutang terlebih dahulu. Responden selanjutnya berhujah bahawa terdapat pertikaian bona fide berhubung hutang yang didakwa perlu dibayar dan terhutang dan penyampaian petisyen itu adalah satu usaha oleh pempetisyen untuk menggagalkan proses timbang tara dengan membuat dakwaan yang tidak berasas seperti yang terdapat dalam petisyen itu.

Diputuskan, menolak petisyen dengan kos RM15,000:

(1) Walaupun hutang pempetisyen hanya perlu dibayar berdasarkan keputusan prosiding timbang tara, ia adalah pemiutang kontinjen dalam maksud s 217(1)(b) Akta tersebut. Oleh itu, pempetisyen mempunyai locus standi untuk mengemukakan petisyen terhadap responden (lihat perenggan 14).

(2) Dalam kes di mana pemiutang, termasuk pemiutang kontinjen atau prospektif telah memilih untuk meneruskan di bawah s 218(2)(c) Akta tersebut, beban terletak pada pemiutang untuk membuktikan sehingga mahkamah berpuas hati bahawa syarikat itu tidak mampu membayar hutangnya. Persoalan sama ada syarikat tidak mampu membayar hutangnya pada asas adalah persoalan fakta (lihat perenggan 28–29).

(3) Di bawah s 218(2)(c) Akta tersebut, alasan untuk penggulungan di bawah s 218(1)(e) Akta tersebut dibuktikan jika plaintif dapat mengemukakan keterangan mencukupi yang mana setelah mengambil kira liabiliti kontinjen dan prospektif syarikat ia tidak mampu membayar hutangnya. Dalam erti kata ini, ketidaksolvenan tidak perlu bukti bahawa liabiliti syarikat melebihi asetnya, tetapi menghendaki pemeriksaan kedudukan kewangan keseluruhan syarikat. Dalam kes ini, laporan kewangan dan nota-nota laporan yang mana pempetisyen bergantung kepadanya telah gagal untuk menunjukkan apa-apa hutang yang tidak mampu dibayar atau patut dibayar oleh responden. Berdasarkan keterangan keseluruhan, dan setelah mengambil kira liabiliti kontinjen dan prospektif responden, tidak dibuktikan bahawa responden tidak mampu membayar hutanganya. Pada hakikatnya lebihan jumlah aset daripada jumlah liabiliti dan keterangan yang tidak

mencukupi untuk menjustifikasikan penemuan bahawa responden adalah tidak solven. Oleh itu, petisyen pempetisyen tidak berasas (lihat perenggan 25–26).

(4) Fakta kedua-dua kes yang dirujuk oleh pempetisyen bagi menyokong kesnya, iaitu *Teck Yow Bros Hand-bag Trading Company v Maharani Supermarket* dan *Morgan Guaranty Trust Company of New York*, adalah berbeza daripada kes ini (lihat perenggan 37–38).]

Notes

For cases on disputed debt, see 3(1) *Mallal's Digest* (4th Ed, 2013 Reissue) paras 1251–1267.

Cases referred to

Calzaturificio Zenith Pty Ltd (in liq) v NSW Leather & Trading Co Pty Ltd [1970] VR 605, SC (refd)

Community Development Pty Ltd v Engwirda Construction Co (1969) 120 CLR 455, HC (refd)

Crocuses & Daffodils (M) Sdn Bhd v Development & Commercial Bank Bhd [1997] 2 MLJ 756; [1997] 3 CLJ 485, CA (refd)

Datuk Mohd Sari bin Datuk Hj Nuar v Idris Hydraulic (M) Bhd [1997] 5 MLJ 377; [1996] 3 CLJ 877, HC (refd)

Four Pillars Enterprises Co Ltd v Beiersdorf Aktiengesellschaft [1999] 1 SLR 737, CA (refd)

Malayan Plant (Pte) Ltd v Moscow Narodny Bank Ltd [1980-1981] 1 SLR 8, PC (refd)

Morgan Guaranty Trust Co of New York v Lian Seng Properties Sdn Bhd [1991] 1 MLJ 95, SC (distd)

Sandell v Porter (1966) 115 CLR 666, HC (refd)

Stonegate Securities Ltd v Gregory [1980] Ch 576, CA (refd)

Teck Yow Brothers Hand-bag Trading Company v Maharani Supermarket Sdn Bhd 1989] 1 MLJ 101; [1989] 2 CLJ (Rep) 555, HC (distd)

Legislation referred to

Companies Act 1965 ss 217(1)(b), 218(1)(e), (i), 218(2)(a), (c)
Companies (Winding-Up) Rules 1972 r 30

Michael Chow (Derek Chong with him) (Michael Chow) for the petitioner.
Foong Chee Keen (CK Oon & Co) for the respondent.

Vernon Ong J:

[1] This winding up petition is presented against the respondent on the following grounds:

(a) that the respondent is unable to pay its debts under s 218(1)(e) read with s 218(2)(c) of the Companies Act 1965 ('Act'); and

(b) that it is just and equitable that the respondent be wound up under s 218(1)(i) of the Act.

[2] The petitioner's case is premised on their assertion that sometime in October 2012, they discovered that the respondent and its group of companies are hopelessly insolvent.

BRIEF ACCOUNT OF THE UNDISPUTED FACTS

[3] Pursuant to an agreement called the engineering, procurement, construction and commissioning contract dated 25 July 2007 ('EPCC contract'), the respondent appointed the petitioner as its contractor to construct a bio diesel plant ('the project') in Kuantan, Pahang Darul Makmur for the contract price of RM120,000,000.

[4] The petitioner has filed two actions against the respondent at the Kuala Lumpur High Court. The first action via Suit No 22NCC-320–03 of 2012 ('Suit 320') is a claim for the final instalment payment of RM49,857,934.70 due under the contract. The second action via Suit No 22NCC-321–03 of 2012 ('Suit 321') is for RM804,123.10 being the price of palm oil and other materials supplied by the petitioner at the request of the respondent. Both Suits 320 and 321 have been stayed by the high court and the claims referred to arbitration. The arbitration in respect of both suits are also pending.

[5] In response to this petition, the respondent has filed an application to strike out the petition. The court ordered that the issues raised in the said application to be tried together at the hearing of the petition.

Locus standi — whether petitioner a creditor, or prospective creditor of company

[6] In law, a winding up petition ('WUP') may be presented by a creditor of the company. Section 217(1)(b) provides that a company may be wound up on the petition of 'any creditor, including a contingent or prospective creditor, of the company'.

[7] Ordinarily, a creditor is a person to whom money is owed and payable by the company. An unpaid creditor, is prima facie, entitled to petition for a winding up order against a company which had failed to pay its debts (see *Morgan Guaranty Trust Co of New York v Lian Seng Properties Sdn Bhd* [1991] 1 MLJ 95 (SC) at p 97.

[8] As can be seen, a 'creditor' as defined under s 217(1)(b) includes both a 'contingent' or 'prospective' creditor of a company. A contingent creditor is a

person to whom a debt is owed, payment of which is only due on the occurrence of some future event (*Community Development Pty Ltd v Engwirda Construction Co* (1969) 120 CLR 455).

[9] A prospective creditor, on the other hand, is a creditor to whom a debt is due but not immediately payable (eg purhase price of goods sold and delivered on 60 days credit). In other words, a prospective creditor is a creditor in respect of a debt which has already been determined or is on some date determinable by reference to some future events (per Buckley LJ in *Stonegate Securities Ltd v Gregory* [1980] Ch 576 at p 579 (CA).

[10] In this case, the WUP is not premised upon a judgment debt; there being no judgment entered against the respondent. Instead, the dispute has been referred to arbitration. As such, the petitioner is not a creditor. The petitioner contends that in view of the relationship between the petitioner and the respondent, the petitioner is a contingent or prospective creditor with locus standi to present this petition. In contrast, the respondent's retort is that the petitioner is not a creditor; and that it is not even a contingent creditor. It was also argued for the respondent that the existence of the arbitration clause prevents the petitioner from presenting this petition.

[11] In *Community Development Pty Ltd v Engwirda Construction Co* the petitioner had presented the petition as a contingent creditor for an amount due pursuant to a construction contract entered into between the petitioner and the respondent company as the employer. The Australian High Court held that a builder whose debt only became payable on the outcome of arbitration proceedings was a contingent creditor and was therefore entitled to present a winding up application; even though the outcome of the arbitration may not be in favour of the builder.

[12] In *Four Pillars Enterprises Co Ltd v Beiersdorf Aktiengesellschaft* [1999] 1 SLR 737 the Singapore Court of Appeal held that the arbitration clause in the joint venture agreement did not restrict or exclude the respondents from exercising their statutory right to present a winding up petition against the company — the matters with which the winding up petition was concerned were not matters which fell within the ambit of the arbitration agreement. This proposition is peculiar to the particular facts of the case; the appellants and respondents therein being shareholders in a joint venture. The respondents as creditor and shareholder of the JVC presented a winding up petition on the grounds that it was insolvent and that it was just and equitable that it should be wound up.

[13] In *Morgan Guaranty Trust Co New York v Lian Seng Properties Sdn Bhd* the then Supreme Court held at p 97:

The issue is whether on the date of the filing of the petition the company was unable to pay its debts. If it is shown by some evidence that the company was unable to pay its debts then the fact that there is a civil suit on the same amount in another jurisdiction is neither here no there.

[14] In this case, Suits 320 and 321 have been stayed and the disputes have been referred for arbitration in the circumstances described above. Whilst there is no certainty that the arbitration will turn out in the petitioner's favour, applying the principles enunciated above, the court is satisfied that the petitioner is a contingent creditor within the meaning of s 217(1)(b). As such, the petitioner has the locus standi to present the WUP against the respondent.

THE PETITIONER'S SUBMISSION

[15] Learned counsel for the petitioner submitted that the parties were in the midst of getting ready to refer the petitioner's claims to arbitration when to their horror, *'it was discovered sometime in October 2012 the respondent and its group of companies was hopelessly insolvent.'* It is contended that the insolvency of the respondent, in particular, and its group of companies, in general, is established as follows:

(a) according to the reports and financial statements of the respondent ('the financial statements') as at 30 June 2012:

(i) the respondent had suffered a loss before taxation of RM131,135,410. While a substantial portion of the declared loss was as a result of the adjustments being made for the impairment loss on the capital work in progress of the bio-diesel plant which the petitioner had built, such an accounting impairment does not detract from the fact that the respondent was an insolvent entity. For instance for the year 2010, without factoring for the impairment loss, the respondent was still suffering from a loss before taxation of RM924,102; and

(ii) the respondent had no independent revenue of its own and was entirely dependent on its holding company, Mission NewEnergy Limited, for financial support. The notes to the said accounts, inter alia, stated that 'The Company is exposed to liquidity risks and seeks to address the liquidity risks by obtaining the financial support from its holding company. The holding company has agreed to provide financial support to the Company to meet its obligation as and when the fall due.'

(b) Mission NewEnergy Limited released its audited account for the year

ended 30 June 2012 sometime in early October 2012. According to this set of report:

(i) for the year ended 30 June 2012, the holding company has a total asset of AUD10,703,000 and total liabilities of AUD35,144,000. Accordingly, the holding company has a total equity deficiency of AUD24,441,000; and

(ii) the notes to the said report also stated as follows:

> The ability of the Group to continue as a going concern in the ordinary course of business and to achieve the business growth strategies and objectives is dependent upon the ability of the Group to do a sufficient combination of the following things to enable its commitments to be met:
>
> (A) obtain shareholder approval for the proposed funding and restructure arrangements with SLW;
>
> (B) failing approval of the SLW arrangements, raise debt or equity funding from other sources;
>
> (C) generate positive cash flows from operations;
>
> (D) raise cash through sales of assets and recovery of receivables; and
>
> (E) reduce case outflows through cost control measures.
>
> The Directors consider that there are reasonable grounds to expert that the group will be able to meet its commitments through the measures listed above, and accordingly have prepared the financial report on a going concern basis in the belief that the group will realize its assets and settle its liabilities and commitments in the normal course of business and for at least the amounts stated in the financial report. However, should the group not be successful in the matters discussed above, there is material uncertainty whether the group will be able to continue as a going concern.

[16] Learned counsel for the petitioner also referred to the auditor's statements which provided the following warning:

> Material uncertainty regarding continuation as a going concern
>
> Without qualifying our opinion, we draw attention to the consolidated statement of cash flow in the financial report which indicates that the consolidated entity incurred operating case outflows of $4.9 million during the year ended 30 June 2012 and, as of that date, the consolidated entity's total liabilities exceeded its total assets by $24.4 million. These condition, along with other matters as set forth in Note 2, indicate the existence of a material uncertainty which may cast significant doubt about the consolidated entity's ability to continue as a going concern and therefore, the consolidated entity may be unable to realise its assets and discharge its liabilities in the normal course of business, and at amounts stated in the financial report.

[17] Learned counsel submitted that given the state of the respondent's accounts including that of its holding company, the state of insolvency required by sub-s (2)(c) of s 218 has been proven. If at all, the above quoted statement from the auditor would conclude this issue in favour of the petitioner (*Teck Yow Brothers Hand-bag Trading Company v Maharani Supermarket Sdn Bhd* 1989] 1 MLJ 101; [1989] 2 CLJ (Rep) 555; *Morgan Guaranty Trust Co New York v Lian Seng Properties Sdn Bhd*).

[18] Learned counsel also argued that since the respondent has never denied the petitioner's assertion that it is insolvent. The respondent did not file an affidavit in opposition to the petition as required under r 30 of the Companies (Winding Up) Rules 1972. Such failure being fatal (*Crocuses & Daffodils (M) Sdn Bhd v Development & Commercial Bank Bhd* [1997] 2 MLJ 756; [1997] 3 CLJ 485. In the absence of any denial of insolvency by the respondent and in the state of the evidence before the court, the petitioner is entitled *ex debito justitiae* to an order for winding up of the respondent (*Malayan Plant (Pte) Ltd v Moscow Narodny Bank Ltd* [1980-1981] 1 SLR 8 at p 11).

THE RESPONDENT'S DEFENCE

[19] Learned counsel for the respondent argued that the issue of solvency does not come into the picture yet because the petitioner must establish that there is a debt which is due and owing first. In this case, there are only unsubstantiated allegations wherein the consultant engineer appointed for the project Konsultant Proses Sdn Bhd ('KONPRO') has not certified the final performance acceptance pursuant to cl 29.1 of the EPCC contract and there is no arbitral award in favour of the petitioner to justify its alleged claim of debt in the winding up petition.

[20] It was also contended that the respondent is a solvent company as the reported total assets are RM7,473,385 with total liabilities of RM1,312,405 as at 30 June 2011.

[21] Learned counsel also argued that it is apparent that the petitioner is attempting to frustrate the arbitral process by making the unfounded allegations in the petition. There is a bona fide dispute as to the debt on substantial grounds. There is ample evidence to show that the petitioner has not completed the project. In particular, there is a letter from KONPRO which stated clearly that the petitioner has not completed the 48 hour performance test as provided under the EPCC contract. There is also evidence from the pr's own exh LCW4 showing that KONPRO has not certified the Final Performance Acceptance. The petitioner has only exhibited an invoice dated 24 May 2010 to support their claim for RM30,500,000. Further, as the dispute

between the petitioner and the respondent arising from the EPCC contract has been referred to arbitration, the question of debt has not yet arisen.

[22] The purported loss of RM131,135,410 stated in the financial statements is not an actual loss suffered. This amount is inclusive of RM90.1m as part of the contract price for the EPCC contract which had already been paid to the petitioner. This amount was stated as 'operational loss' based on the Malaysian Accounting Standards Board: Financial Reporting Standard 136: Impairment Assets. Based on the accounting standards in Malaysia, as the project is non operational it is classified as an 'impaired asset' whereby the sum of RM131,135,410 is required to be stated in the negative until the project is operational. When it becomes operational. The loss is to be reverted into positive as it begins to generate profit. Therefore, there is in fact no actual loss of RM131,135,410.

FINDINGS OF THE COURT

Inability to pay its debts — statutory presumption

(Petitions under s 218(1)(e) read with s 218(2)(a))

[23] In most instances a WUP is presented against a company on the basis that the company is unable to pay its debts under s 218(1)(e). Such petitions are usually preceded by the service of a notice of demand under s 218(2)(a), otherwise commonly known as a 's 218 Notice' on a company giving it 21 days ('three weeks') to pay the debt stated therein, it is noted that there are two requirements — (i) the statutory minimum amount of the debt owing by a company must be not less than RM500; and (ii) there must be a prior demand under the s 218 Notice. If the company fails to pay the debt within the stipulated period, the company is presumed to be unable to pay its debts — this presumption constitutes the basis of the winding up petition.

(Petition under s 218(1)(e) read with s 218(2)(c))

[24] Whilst the petition in this case is predicated on the respondent's inability to pay its debts under s 218(1)(e), it is not premised on the same assumption as in the preceding paragraph. Instead, the presumption is grounded on the respondent's contingent and prospective liabilities — which factors the court will take into account in determining whether the respondent is unable to pay its debts. Therefore, there is no s 218 Notice in this instance; the petitioner did not serve any s 218 Notice on the respondent. Instead, the WUP was presented against the respondent on the ground that the respondent is unable to pay its debts under s 218(1)(e) because of its contingent and prospective liabilities pursuant to s 218(2)(c). Section 218(2)(c) reads as follows:

Definition of inability to pay debts.

(2) A company shall be deemed to be unable to pay its debts if -

(a) …;

(b) …; or

(c) it is proved to the satisfaction of the Court that the company is unable to pay its debts; and in determining whether a company is unable to pay its debts the court shall take into account the contingent and prospective liabilities of the company, (emphasis added)

[25] Therefore, under s 218(2)(c), the ground for winding up under s 218(1)(e) is made out if the court, after taking into account the company's contingent and prospective liabilities, is satisfied that the company is unable to pay its debts. In this sense, insolvency does not necessarily require proof that the company's liabilities exceeds its assets. It means that the company is unable to pay its debts as they become due. This requires an examination of the company's entire financial position. Evidence suggesting a temporary lack of liquidity is not sufficient to prove that a company is unable to pay its debts (*Sandell v Porter* (1966) 115 CLR 666)

[26] The meaning of the words 'an inability to pay debts' in the context of the then Australian equivalent of s 218 was considered by Menhennit J in the Australian case of *Calzaturificio Zenith Pty Ltd (in liq) v NSW Leather & Trading Co Pty Ltd* [1970] VR 605 where he said:

> Merely to take a balance sheet which puts opposite book debts and creditor's liabilities as if they were to be equated is in my view, erroneous. It would be necessary to make an appropriate calculation to decide when the creditors had to be paid and when the debts were likely to be received in order to decide whether at any particular moment in time the company was or was not able to pay its debts as they fell due.

[27] In *Datuk Mohd Sari bin Datuk Hj Nuar v Idris Hydraulic (M) Bhd* [1997] 5 MLJ 377; [1996] 3 CLJ 877, the High Court preferred the 'overall assets and liability test' over the 'quick assets test' in determining the insolvency of the company under s 218(2)(c). In that case, the petitioner claimed a debt of RM30m against the respondent. He presented a winding up petition under s 218(1)(e) read with s 218(2)(c) and s 218(1)(i). The respondent applied to strike out the petition on the grounds that it was, inter alia, an abuse of the process of the court. The High Court held that the respondent was not insolvent as there was a surplus of total assets over total liabilities amounting to RM329m. At pp 390 (MLJ); 895 (CLJ), Kamalanathan Ratnam JC (as he then was) said:

> Section 218(2)(c) is very clear. To ascertain if a company is unable to pay its debt the court shall take into account the contingent and prospective liabilities of the company. In order to ascertain its liabilities, it is proper that its assets are also ascertained because only upon ensuring that there is insufficient assets to meet the debts can there be ascertained liabilities. Therefore the current assets must be taken stock of to see if after considering the total liabilities both contingent and prospective there is a surplus deficit.

(Burden of proof under s 218(2)(c))

[28] Where a creditor, including a contingent or prospective creditor has elected to proceed under s 218(2(c), the onus of proof is on the creditor to prove to the satisfaction of the court that the company was unable to pay its debts.

[29] The question of whether a company is unable to pay its debts is essentially question of fact. The creditor must establish the facts to show that the company is insolvent. It can be proved through evidence showing that the company's cheques have been dishonoured or that it has a significant number of unpaid debts and unsatisfied judgments. It may also proved by showing that the company has ceased trading or business activities altogether or has no assets. The fact that a receiver and manager has been appointed under a debenture to take possession of its assets may also be a significant factor.

[30] The petition and the affidavit verifying petition referred to the financial statements of the company as at 30 June 2012. In the first instance, the financial statements exhibited are as at 30 June 2011 and not 30 June 2012.

[31] Be that as it may, the petition relies on the notes to the financial statements. in this case, the financial statements of the respondent as at 30 June 2011 shows that the respondent has a total current assets of RM7,473,385 against total liabilities of RM1,312,405; this is evident on a perusal of the 'STATEMENT OF FINANCIAL POSITION AS AT 30 June 2011'. The petitioner makes much of the loss before taxation states to be RM131,135,410 reported under the 'STATEMENT OF COMPREHENSIVE INCOME For The FINANCIAL YEAR ENDED 30 JUNE 2011'. This amount is actually explained in Note 13 to the financial statements which reads as follows:

LOSS Before TAXATION

Loss before taxation has been other items the followings (sic):

	2011	2010
	RM	RM
Audit fee		

- Current year	7,000	12,000
- Other	9,000	10,000
Directors' fee	120,000	120,000
Foreign exchange loss/(gain) - realised	523,089	(76,426)
Foreign exchange gain-unrealised	(111,644)	(23,531)
Impairment loss on capital-work-in-progress	127,514,841	
Interest income	(6,604)	(156,408)

[32] The explanatory note above is consistent with the submission of learned counsel for the respondent that of the RM131,135,410 is treated as an impaired loss on capital work in progress — which relates to the project. Out of this sum, RM90m has already been paid to the petitioner. As such, the court is not satisfied that the sum in question is an actual loss suffered by the respondent. This finding is supported by the statement of the financial position of the respondent which shows that the total assets (RM7,473,385) of the respondent exceeds the total liabilities (RM1,312,405).

[33] Apart from the financial statements of the respondent, the petitioner laid emphasis on the notes to the report under the section entitled 'Financial Risks Management Policies' of the respondent. With respect, whilst this note states that the respondent is exposed to liquidity risks — this of itself does not mean that the respondent is insolvent. It is not evidence of the respondent's inability to pay its debts. At any rate, the petitioner has failed to point to any debt to which the respondent is unable to pay or liable to pay. It is pertinent to add according to this note the respondent seeks to redress the liquidity risks by obtaining the financial support from its holding company and that the holding company has agreed to provide financial support to the respondent to meet its obligations as and when they fall due.

[34] To counter this the petitioner has referred to the holding company's financial report for year ended 30 June 2012 which shows that it has a total equity deficiency of AUD24,441,000. On the face of it, this appears ominous indeed. However, it is also necessary to peruse the note to the holding company's financial report — it states that the ability of the group to continue as a going concern in the ordinary course of business is dependent on its ability to do a sufficient combination of things (see above) to enable its commitments to be met. It adds that the directors consider that there are reasonable grounds to expect that the group will be able meet its commitments through the measures listed.

[35] In itself, these notes do not support the notion that the holding company is also insolvent. Neither does it support the notion that the holding company is unable to provide financial support to the respondent to meet its obligations as and when they fall due. The petitioner has also failed to produce any evidence to show that the holding company has not been able to meet its commitments.

[36] On the evidence as a whole, the court is not satisfied that taking into account the respondent's contingent and prospective liabilities, the respondent is unable to pay its debts. There was in fact a surplus of total assets over total liabilities. There was insufficient evidence before the court to justify the court in making a finding in favour of the petitioner to the effect that the respondent is insolvent.

[37] In *Teck Yow Brothers Hand-bag Trading Company v Maharani Supermarket Sdn Bhd* a petition to wind up the respondent was made under ss 218(2)(b) and (c). The petition was opposed by a creditor was the landlord of the respondent; and who had levied distress proceedings after the petition was presented. One of the issue was whether it was just and equitable to wind up the respondent. In that case, the High Court considered the contingent and prospective liabilities of the respondent; the respondent's debt amounted to RM100,000. The amount owing to the opposing creditor was RM40,000 and the distress only realised RM61,000. Further, the directors of the respondent have absconded and a provisional liquidator had already been appointed. In all the circumstances, the High Court concluded that the respondent was unable to pay its debt and accordingly made an order to wind up the respondent. The facts of this case are distinguishable from the present case. As such, *Teck Yow Brothers* is of no aid to the petitioner's case.

[38] In *Morgan Guaranty Trust Company of New York* the respondent had taken a loan from AIA Company Limited, the repayment of which was guaranteed by the petitioner. Under the guarantee agreement, it was agreed that if the petitioner/guarantor informed the respondent that AIA had required the petitioner/guarantor to pay any part of the amount guaranteed the respondent should forthwith on demand pay such amount to the petitioner/guarantor notwithstanding that the sum called for might not have been properly due. AIA had demanded payment from the petitioner/guarantor of the sum of RM33m pursuant to the guarantee. The petitioner/guarantor then demanded this sum from the respondent but the respondent had failed to pay the said sum. The winding up petition relied on the profit and loss account of the respondent which showed that liabilities exceed assets and that the respondent had incurred a loss. The respondent applied to set aside the petition on the grounds that the petitioner was not entitled to present the petition and that the petition did not disclose a cause of action. The High Court set aside the

petition on the sole ground that the petitioner had no locus standi to present the petition. The petitioner appealed to the Supreme Court against this decision. Allowing the appeal, the Supreme Court held that prima facie a creditor is entitled to petition for a winding up against a company which fails to pay its debts. The petition should not have been struck out in limine and should have been heard on its merits. The facts in *Morgan Guaranty* are also distinguishable with the present case. The issue in *Morgan Guaranty* related to the question of the petitioner's locus standi and the fact that the petition ought to have been heard on its merits instead of being stuck out in limine.

[39] For the foregoing reasons, the petition is unsubstantiated and must be dismissed with costs of RM15,000.

Petition dismissed with costs of RM15,000.

Reported by Kohila Nesan